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**BY HAND DELIVERY**

Jeff S. Jordan, Esq.  
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Federal Election Commission  
999 E Street N.W.  
Washington, D.C. 20463

**Re: MUR 7124**

Dear Mr. Jordan:

On behalf of EMILY's List and Ranny Cooper in her official capacity as treasurer, and WOMEN VOTE! and Leigh Warren in her official capacity as treasurer,<sup>1</sup> (collectively, "Respondents"), we submit this letter in response to the Complaint filed by the Foundation for Accountability and Civic Trust ("Complainant") on August 15, 2016 ("the Complaint").

The Complaint falsely alleges that two communications paid for by WOMEN VOTE!, an independent expenditure-only political committee, were coordinated with Katie McGinty for Senate ("the Campaign") and republished Campaign materials, resulting in prohibited in-kind contributions to the Campaign. The only factual basis for the Complaint's allegations are the alleged similarities in theme between the WOMEN VOTE! advertisements and reported<sup>2</sup> earlier communications made by the Campaign on the Campaign's publicly available website. The Commission has made clear on several occasions that such activity does not provide a basis to find that a communication is "coordinated." Because the Complaint does not allege any other facts showing that coordination took place, and indeed no other activity that would amount to coordination did take place, the Complaint fails to state any facts that, if true, would constitute a violation of the Federal Election Campaign Act of 1971, as amended ("the Act"). The Commission should therefore dismiss the Complaint and close the file.

<sup>1</sup> WOMEN VOTE! named a new treasurer, Leigh Warren, in place of its former treasurer, Denise Feriozzi, in an amended Statement of Organization filed with the Commission on September 28, 2016. An updated Designation of Counsel form containing Ms. Warren's signature is enclosed.

<sup>2</sup> The Complaint alleges (and a news article upon which the Complaint relies reported) that certain messages were posted on the Campaign's publicly available web site. However, since no messages described in the Complaint appear on the Campaign's site for review, Respondents refer to the messages as "reported" or "alleged" messages herein.

## FACTUAL BACKGROUND

In April 2016, WOMEN VOTE! began airing two advertisements ("the Advertisements") in Pennsylvania in support of Katie McGinty's candidacy for United States Senate. The script for the first advertisement, entitled "Get," reads as follows:

Get up. Get to school. Get to work. Get by. Katie McGinty knows the routine. Her dad was a Philly cop, mom worked in a restaurant. Then . . . hard work opened doors. Now . . . it's not quite enough. But McGinty's working to change that. Helping create thousands of new jobs. She'll always stand up for manufacturing, higher wages, and equal pay for women. So opportunity never gets out of reach. Katie McGinty Democrat for Senate.

The Complaint falsely alleges that this advertisement was coordinated with the Campaign and republished Campaign materials from the Campaign's website, solely because the Campaign's website indicated that Ms. McGinty is "the daughter of a police officer who walked the beat and a restaurant hostess." The only overlap between the publicly available statement on the website and the WOMEN VOTE! advertisement is the occupations of Ms. McGinty's parents, information that was common knowledge and publicly available from innumerable sources.<sup>3</sup>

The second WOMEN VOTE! advertisement at issue in the Complaint entitled "Spin" criticized Ms. McGinty's primary opponent, Joe Sestak, for his support of an economic plan created by the National Commission on Fiscal Responsibility and Reform ("the Debt Commission"). The script for the "Spin" ad reads as follows:

For Senate, no spin . . . just facts. Joe Sestak supports a plan that the New York Times reported makes cuts to Social Security benefits. And the plan raises the retirement age. It's true. The AARP opposed the plan, citing dramatic cuts to Medicare benefits. The plan Sestak supports means higher out of pocket costs for

<sup>3</sup> See, e.g., C. Vargas, "Local elected officials endorse Katie McGinty for U.S. Senate," *available at* <http://www.philly.com/philly/blogs/heardinthehall/Local-elected-officials-endorse-Katie-McGinty-for-US-Senate.html> (Dec. 8, 2015) ("McGinty's father was a Philadelphia officer and her mother was a waitress"); H. Wu, "Katie McGinty 101: 10 things to know about Tom Wolf's new chief of staff," *BillyPenn*, *available at* <http://billypenn.com/2014/11/10/katie-mcginty-101-10-things-to-know-about-tom-wolfs-new-chief-of-staff/> (Nov. 10, 2014) ("McGinty grew up in Northeast Philly as the ninth of 10 kids . . . Her father was a Philly police officer; her mother was a waitress."); "Kathleen McGinty," *Wikipedia*, *available at* [https://en.wikipedia.org/wiki/Kathleen\\_McGinty](https://en.wikipedia.org/wiki/Kathleen_McGinty) ("The ninth of ten children of a retired police officer and a waitress, McGinty was born in Philadelphia.").

millions on Medicare. Any way you spin it. The truth about Sestak is gonna hurt.

The Complaint falsely alleges that the "Spin" advertisement was coordinated with the Campaign and republished a Campaign message solely because there was a different publicly available message reportedly posted on the Campaign website that was also critical of Sestak's policies on Social Security. There is no allegation that either of the WOMEN VOTE! advertisements were identical to any Campaign videos or statements or that there was any conduct of any kind between the Campaign and WOMEN VOTE! that would amount to prohibited coordination. And, in fact, no coordination occurred. WOMEN VOTE! created, produced, and disseminated the Advertisements independently of any candidate, candidate's committee, or any agents of the foregoing.

Separately, EMILY's List is named as a Respondent in the Complaint, but the Complaint does not allege that EMILY's List sponsored any paid public communications that could have been coordinated. To the extent that the Complaint can be construed to allege that WOMEN VOTE!'s advertisements were coordinated because they were based on information obtained by WOMEN VOTE! from EMILY's List, EMILY's List and WOMEN VOTE! maintain a firewall between them in compliance with the Act and Commission regulations to protect them from such speculative allegations.

### LEGAL ANALYSIS

#### A. The Complaint Does Not Allege Facts Establishing that the Advertisements were Coordinated Communications

A communication is a "coordinated communication" under 11 C.F.R. § 109.21 only if it satisfies the three prongs of the coordination standard, including one or more of the conduct standards set forth in 11 C.F.R. § 109.21(d). Republication of campaign materials under 11 C.F.R. § 109.23 requires the "dissemination, distribution, or republication, in whole or in part, of any . . . written, graphic, or other form of campaign materials . . . ." <sup>4</sup> Because the Complaint fails to provide facts showing any request, suggestion, or assent, substantial discussion, or material involvement on the part of the Campaign or its agents in connection with the Advertisements, and fails to show any reproduction of Campaign materials, the Commission should find no "reason to believe" a violation of the Act occurred.

1. The conduct prong has not been satisfied

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<sup>4</sup> 11 C.F.R. § 109.23(a).

The Complaint alleges that the Advertisements amount to a “request or suggestion” on the part of the Campaign that satisfied the conduct prong of the coordination standard. That allegation is wrong as a matter of law. The Commission’s regulations are clear that campaign communications appearing on a publicly available website—such as the Campaign messages—are *never* a basis to find that the conduct prong has been satisfied.

In 2003, the Commission published its revised coordination rule which provided that a request or suggestion on a publicly available website could *never* satisfy the “conduct prong.” As the Commission set forth, “[t]he ‘request or suggestion’ conduct standard in paragraph (d)(1) is intended to cover requests or suggestions made to a select audience, but not those offered to the public generally. For example, a request that is posted on a web page that is available to the general public is a request to the general public and does not trigger the conduct standard in paragraph (d)(1), but a request posted through an intranet service or sent via electronic mail directly to a discrete group of recipients constitutes a request to a select audience and thereby satisfies the conduct standard in paragraph (d)(1).”<sup>5</sup>

Three years later, the Commission again explained that the use of publicly available information by a third party did *not* satisfy the conduct prong.<sup>6</sup> The Commission reiterated that position in MUR 6411 in 2011 when it dismissed a similar complaint against WOMEN VOTE!, finding that an allegation that WOMEN VOTE! sponsored communications shortly after Democratic candidates and aides made public statements encouraging outside groups to “do more” to support Democratic candidates, was not sufficient to satisfy the coordination standard.<sup>7</sup> In making that determination, the Commission emphasized that under the Commission’s safe harbor, a communication created with information found, for instance, on a candidate’s or political party’s Web site, or learned from a public campaign speech or newspaper advertisement, is not a coordinated communication if that information is subsequently used in connection with a communication.<sup>8</sup>

Indeed, as recently as last year, in MUR 6821, the Commission reiterated that “a communication resulting from a general request to the public or the use of publicly available information, including information displayed on a candidate’s campaign website, does not satisfy the conduct

<sup>5</sup> Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003).

<sup>6</sup> Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (June 8, 2006).

<sup>7</sup> MUR 6411, First General Counsel’s Report (May 16, 2011).

<sup>8</sup> MUR 6411, General Counsel’s Report at 12 (referencing Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003)).

standards.”<sup>9</sup> The facts in that enforcement matter were essentially identical to those presented in this Complaint. The Complaint in MUR 6821 alleged in relevant part that an advertisement sponsored by Senate Majority PAC, an independent expenditure-only committee, was coordinated with Senator Jeanne Shaheen’s campaign based on thematic similarities between the committee’s advertisement and a message that had been posted on Senator Shaheen’s campaign website.<sup>10</sup> In accordance with the coordination rules set forth above, the Commission declined to find reason to believe that Senate Majority PAC’s advertisement was coordinated with Senator Shaheen’s campaign because the “alleged thematic similarities” between the committee’s advertisement and the message posted on Senator Shaheen’s campaign website, and their “rough temporal proximity” did “not give rise to a reasonable inference that any of the conduct standards were satisfied.”<sup>11</sup> This matter compels the same result. To find otherwise would be inconsistent with the Commission’s duty to “treat like cases alike.”<sup>12</sup> The Complaint fails to allege any facts showing that the Campaign made a “request or suggestion” that WOMEN VOTE! disseminate any advertisements on its behalf. In fact, the Complaint offers no evidence of any communication actually directed at Respondents. Rather, just as in MUR 6821, the alleged “requests” were directed to the public at large on the Campaign’s website.<sup>13</sup>

While the Complaint references other standards of the conduct prong, it does not allege facts that could support a finding that the Campaign was “materially involved in decisions” regarding any specific aspects of the Advertisements or that any “substantial discussion” about the Advertisements occurred. Furthermore, Commission regulations expressly provide that neither of these conduct standards are satisfied “if the information material to the creation, production,

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<sup>9</sup> MUR 6821, Factual and Legal Analysis (Dec. 2, 2015).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 8.

<sup>12</sup> *Bush-Quayle '92 Primary Committee v. FEC*, 104 F.3d 448, 454 (D.C. Cir. 1997). See also 5 U.S.C. § 706 (barring agency conduct that is arbitrary, capricious and contrary to law).

<sup>13</sup> The Complaint insinuates that the Campaign messages were not publicly available by stating that the messages were placed on a “somewhat public web page” and that this “is not a case where a super PAC has lifted information available to the general public from a candidate’s web page.” Compl. at 5-6. However, Complainant itself recognizes that the notion that Ms. McGinty’s campaign committee’s website—[www.katiemcginty.com](http://www.katiemcginty.com)—is not publicly available is meritless. The Complaint also incorrectly contends that the rule that republication cannot occur where campaign communications are made publicly available does not apply to requests or suggestions under 11 C.F.R. § 109.21(d)(1) because that section of the regulation does not explicitly provide for such an exception, and because “[a]ny other interpretation would be contrary to the plain language of the Commission’s regulations.” Compl. at 6 n. 29. However, this idea is erroneous given that the Commission has explicitly stated that “the request or suggestion standard in paragraph (d)(1) [of 11 C.F.R. § 109.21]” does not cover communications offered to the public generally. Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003).

or distribution of the communication was obtained from a publicly available source.”<sup>14</sup> Thus, the Complaint’s argument that the Advertisements “meet several of the conduct prongs under 11 C.F.R. 109.21(d)”<sup>15</sup> contradicts the clear terms of the regulations and is without merit.

2. The Advertisements did not republish Campaign materials

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Republication of campaign materials under 11 C.F.R. § 109.23 requires the “dissemination, distribution, or republication, in whole or in part, of any . . . written, graphic, or other form of campaign materials . . . .”<sup>16</sup> However, republication does not occur where the “campaign material used consists of a brief quote of materials that demonstrate a candidate’s position as part of a person’s expression of its own views.”<sup>17</sup> The Complaint alleges that the Advertisements republished Campaign materials in violation of the republication provision. They decidedly did not. The Complaint itself admits that the Advertisements did not *copy* the reported Campaign messages.<sup>18</sup> Indeed, the information that was allegedly “republished” from the Campaign included general biographical facts about Ms. McGinty that are clearly public information.<sup>19</sup> Moreover, even if WOMEN VOTE! did incorporate information from the Campaign messages into the Advertisements, and there are no facts alleged to suggest that it did, WOMEN VOTE!’s use of the campaign materials would fall into the brief quote exception to the republication rule. Statements in the Advertisements about Ms. McGinty’s background, her positions on issues such as equal pay for women, and Joe Sestak’s record on Social Security would have consisted of nothing more than a brief quote of Campaign materials used to express WOMEN VOTE!’s own views as to why voters should not support Joe Sestak and should support Ms. McGinty’s candidacy for Senate instead.

What is more, the Commission has repeatedly rejected the idea that incorporating publicly available information into a third party’s advertisement amounts to “republication,” explaining that overlaps in theme are “not enough to suggest coordination,”<sup>20</sup> and that “[t]he practical reality

<sup>14</sup> 11 C.F.R. § 109.21(d)(2),(3); *see also* Explanation and Justification, Coordinated Communications, 71 Fed. Reg. 33,194, 33,205 (June 8, 2006) (“a communication created with information found, for instance on a candidate’s . . . Web site . . . is not a coordinated communication if that information is subsequently used in connection with a communication.”).

<sup>15</sup> Compl. at 4.

<sup>16</sup> 11 C.F.R. § 109.23(a).

<sup>17</sup> *Id.* § 109.23(b)(4).

<sup>18</sup> Compl. at 7 (recognizing that the Advertisements were “not verbatim”).

<sup>19</sup> *See supra* n. 3.

<sup>20</sup> MUR 6821, Factual and Legal Analysis (Dec. 2, 2015).

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is that an intelligently planned independent expenditure effort will always employ similar themes and issues, or attack the same weaknesses of the opponent, as the campaign of the beneficiary candidate.”<sup>21</sup> Moreover, thematic similarities between a third party advertisement and campaign materials are “reasonably attributed to the common sense conclusion that most parties and candidates will be addressing a defined set of campaign issues in their advertising. The Commission has no legal basis to assign a legal consequence to these similarities without specific evidence of prior coordination.”<sup>22</sup> Here, there is no indication of prior coordination, and no inclusion of candidate campaign materials that could trigger the Act’s republication provision.

3. Respondents maintain a firewall between them to protect them from speculative allegations of coordination

Finally, the Complaint does not allege that EMILY’s List sponsored any coordinated communications. To the extent that the Complaint can be construed to allege that WOMEN VOTE!’s advertisements were coordinated because they were based on information obtained by WOMEN VOTE! from EMILY’s List, EMILY’s List and WOMEN VOTE! maintain a firewall between them in compliance with the Act and Commission regulations to protect them from such speculative allegations. The conduct standards in 11 C.F.R. § 109.21(d) “are not met if [an organization] has established and implemented a firewall” meeting certain requirements.<sup>23</sup> Where such a firewall exists, only “specific information” showing the flow of material information about a candidate’s plans, projects, activities, or needs to the sponsor is sufficient to defeat the presumption that the conduct standard has not been met.<sup>24</sup> The Complaint does not allege that this flow of material information occurred nor does it present any “specific information” to support such an allegation.

### CONCLUSION

The Commission may find “reason to believe” only if a Complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the Act.<sup>25</sup> Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true, and provide no

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<sup>21</sup> MUR 2766, Statement of Reasons of Commissioner Josefiak at 23.

<sup>22</sup> See Statement for the Record, Commissioners David M. Mason, Bradley A. Smith, and Michael E. Toner, MUR 5369 at 5 (Aug. 15, 2003).

<sup>23</sup> 11 C.F.R. § 109.21(h).

<sup>24</sup> *Id.*

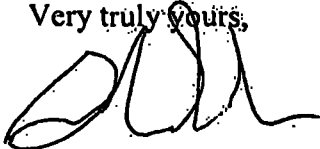
<sup>25</sup> See *id.* § 109.21(a).

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independent basis for investigation.<sup>26</sup> The Complaint does not provide any facts, which, if proven true, would constitute a violation of the Act. Instead, the only factual allegations contained in the Complaint cannot amount to coordination as a matter of law. Even if the allegations are true, that WOMEN VOTE! sponsored two advertisements after reading publicly available statements available to all on the Campaign's website —there is no basis to find a violation of the Act.

Accordingly, the Commission should reject the Complaint's request for an investigation, find no reason to believe that a violation of the Act or Commission regulations has occurred, and immediately dismiss this matter.

Very truly yours,



Marc E. Elias  
Graham M. Wilson  
Aria C. Branch  
Counsel to Respondents

Enclosure

<sup>26</sup> See Statement of Reasons, Commissioners Mason, Sandstrom, Smith, and Thomas, MUR 4960 (Dec. 21, 2001).